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No. 61

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL DI RE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 41–47) are reported at 159 F. 2d 818.

JURISDICTION

The judgment of the circuit court of appeals was entered February 3, 1947 (R. 47), and a petition for rehearing was denied March 14, 1947 (R. 49). On March 5, 1947, the Government's time to file a petition for a writ of certiorari was extended by order of Mr. Justice Jackson to April

4, 1947 (R. 50).[1] The petition for a writ of certiorari was filed April 2, 1947, and was granted May 19, 1947 (R. 50). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, when officers have been informed that contraband is to be transferred at a certain place, and their observations reasonably justify the conclusion that the transfer has occurred in an automobile at such place, they are justified in searching and arresting a third person present in the automobile about whom they had no previous information.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment to the Constitution provides—

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[1] The extension of time to file a petition for a writ of certiorari was requested because the Government's application for rehearing was made beyond the period fixed by the rules of the Circuit Court of Appeals for the Second Circuit. However, the denial of that application was on the merits.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides—

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 28 of the Criminal Code, 18 U. S. C. 72, provides—

> Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to or presented at, the office of any officer of the United States, any such false, forged, altered, or

> counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States, shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Section 177 of the New York Code of Criminal Procedure provides—

> A peace officer may, without a warrant, arrest a person,
>
> 1. For a crime, committed or attempted in his presence;
>
> 2. When the person arrested has committed a felony, although not in his presence;
>
> 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.

STATEMENT

Respondent was indicted on one count, in the United States District Court for the Western District of New York, for knowingly possessing a quantity of counterfeit gasoline ration coupons (R. 3, 36), in violation of Section 301 of the Second War Powers Act, 1942 (50 U. S. C. App., Supp. V, 633). At his trial, the following facts were developed in evidence:

O'Donnell, an O. P. A. investigator, was informed by a man named Reed that one Buttitta.

was to sell Reed counterfeit gasoline ration coupons at a place in Buffalo, N. Y., known as the Deco Stand (R. 8, 15). O'Donnell and Gross, a detective of the Buffalo Police Department, caught sight of Buttitta's car, followed it, and some minutes later saw it parked at the Deco Stand (R. 8–9, 15). They approached the car and found Buttitta in the driver's seat, respondent beside him, and Reed in the back seat (R. 5, 9). Respondent was dressed in working clothes (R. 14). Reed had two coupons in his hand (R. 5, 9, 15), which at the trial were shown to be counterfeit (R. 15, 24, 25). Reed said the coupons had been given to him by Buttitta (R. 5, 9, 15). Detective Gross felt the outside of the clothing of all three men to see if they carried weapons (R. 9, 15), and then all three men were taken to the police station (R. 5, 10, 15–16). At the station, respondent was told to lay his possessions on the table, and he then produced two gasoline ration coupons and several fuel oil coupons, stating that he had found them on the street (R. 6, 13, 16). When questioned, he said that he met Buttitta when he finished work and that Buttitta asked him to go for a ride; that the coupons had been given to him (R. 16). Respondent was "booked" about two hours later, and was then thoroughly searched. At that time an envelope containing 100 inventory gasoline ration coupons was found concealed between his shirt and underwear (R. 7, 14). Both the two

gasoline coupons first produced and the 100 coupons found in the envelope proved to be counterfeit (R. 6, 7, 24–25).

Respondent did not move before trial to suppress the coupons which had been taken from his person. However, at the trial, when the coupons were offered in evidence in the course of Detective Gross's testimony as to the circumstances under which they were obtained, respondent moved to exclude them on the ground that his arrest and search were illegal (R. 5–6). Government counsel suggested that a preliminary examination would be out of order until the witness had concluded his testimony (R. 6). Detective Gross and the O. P. A. investigator, O'Donnell, testified as to the circumstances under which respondent had been searched (R. 7–19). Thereupon, the trial judge excused the jury and heard argument on the admissibility of the coupons (R. 19). No question was raised as to the timeliness of the motion to suppress, but both sides argued the validity of the search (R. 19–20). The trial judge ruled that he would admit the coupons in evidence (R. 20).

The jury found respondent guilty, and he was sentenced to imprisonment for one year and to pay a fine of $100; execution of the fine was suspended (see R. 37). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed (R. 47) on the ground that the counterfeit ration coupons introduced in evi-

dence against respondent were obtained as the result of an unlawful search (R. 41–44). The majority of the circuit court of appeals held that respondent's presence in the car did not constitute probable cause for believing that he was a party to the conspiracy between Buttitta and Reed, and hence that there was no probable cause for his arrest and for the search of his person incident to such arrest (R. 41–44). Judge Clark dissented (R. 44–47), essentially on the ground that "police officers cannot be held unreasonable in declining to view as a mere bystander one who accompanies a criminal to a crime rendezvous" (R. 44–45).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that the counterfeit ration coupons were inadmissible in evidence.

(2) In holding that the police officer did not have probable cause to search respondent's person when he was found in a vehicle used to carry contraband.

(3) In holding that there was insufficient probable cause for the arrest of respondent.

(4) In reversing the judgment of conviction.

SUMMARY OF ARGUMENT

When the police officer found that respondent had been brought in an automobile by known conspirators to the place previously arranged for the transfer of counterfeit ration coupons, he was justified in taking respondent to the station house

and searching him there. His action was reasonable, either as a search of the person incident to a valid arrest, or as incident to the search of a moving vehicle believed to be carrying contraband.

I

If respondent's arrest was lawful, then the search of his person as an incident of the arrest was lawful also.

Respondent's arrest was legal under the second clause of Sec. 177 of the New York Code of Criminal Procedure because, being in possession of counterfeit ration coupons, he had in fact committed a felony, though not in the presence of the officer.

In any event, there was probable cause for the officer to believe that respondent was implicated in felonies which had been committed. The agreement between Buttitta and Reed to transfer counterfeit ration coupons and bring about their possession by Reed was a conspiracy and thus a felony. The transfer of the coupons by Buttitta to Reed pursuant to that conspiracy and their possession by Reed were also felonies. These felonies had in fact been committed and the arresting officer had reasonable cause to believe that they had been committed. Hence, he had the right to arrest any person reasonably believed to be implicated in those felonies. *Carroll* v. *United States*, 267 U. S. 132, 156.

This Court has emphasized that actual guilt need not be established to show probable cause, that it is sufficient if the officer acts as a reasonably prudent man. *Dumbra* v. *United States*, 268 U. S. 435, 441. The fundamental error in the decision of the majority below is that, in determining the validity of the arrest of respondent, it misapplies the rule of substantive guilt that mere knowledge of a conspiracy is not sufficient to establish guilt as a conspirator. Even at a trial, proof of association with known conspirators and proof of presence at the time of the commission of an overt act are relevant facts to be considered in determining whether a particular individual has participated in the conspiracy. For at least three centuries the presence of a person at the time of the commission of an offense has been considered sufficient probable cause for his arrest. Such a rule is based on a simple fact of human conduct, i. e., that criminals are not prone to arrange to have disinterested third parties present to witness their crimes.

Here petitioner was deliberately brought by known conspirators to a place previously arranged for the commission of a felony. When approached by the police officers he made no protestation of innocence and made no explanation for his conduct. The police officers were, therefore, justified in concluding that he was implicated in the crime just committed.

II.

The undisputed facts established that the vehicle in which respondent was found was being used to transport contraband, i.e., counterfeit ration coupons. Hence, the officer had authority to stop and search the automobile irrespective of his right to arrest the occupants of the automobile. *Carroll* v. *United States,* 267 U. S. 132, 158–159. That right was not lost merely because the vehicle had come to a stop a short time before the officers approached. *Scher* v. *United States,* 305 U. S. 251, 255.

Inasmuch as a search of the car would clearly have been proper, a search of the occupants of the car was also proper. And, since the contraband sought was a small article which could easily be concealed on the person, a right to search the car would be meaningless without a right to search the persons in the car. At the very least, the right to search the vehicle for the type of contraband here sought carried with it the right to search respondent to the extent that he was first searched at the police station when he was asked to lay his possessions on the table. Thereafter, when respondent produced two gasoline coupons with the unlikely explanation that he had found them on the street, there was ample justification for his arrest and for the more thorough search of his person as incident thereto.

The fact that this search of respondent's pockets was conducted at the station house, rather than at the place where the car was parked does not affect its validity under the foregoing principles. If there was a right to search at all, there was a right to conduct that search in a suitable place. The public street on which the automobile was found was not a place in which the search of a person's clothing could reasonably be conducted. It was therefore reasonable, and by the same token, proper, to take respondent to a place where a search of his person could be conducted effectively.

ARGUMENT

The factual situation in this case is a simple one. Police officers receive information that two persons have entered into a conspiracy to transfer contraband—i. e., property the very possession of which is a crime—at a certain time and at a certain place. At that time and at that place they observe facts justifying the conclusion that the contemplated crime, a felony, has been committed. Present at that time and in that place, in a confined area—inside an automobile—is a third person brought along by the conspirators, dressed in ordinary working clothes, who, at the time the police approach, makes no protestation of innocence and gives no explanation of his presence. The narrow question here is whether a police officer has any reasonable basis for concluding that the

third person present at the commission of the crime under such circumstance has some interest in the criminal venture, or whether he is required to treat such third person as a disinterested party who merely happened to be present at the time the crime was committed.

We think that the question answers itself; that, in the judgment of the community, a law enforcement officer would be considered derelict in his duty if he allowed such third person to depart without seeking to determine his part in the crime just committed. And, since the validity of an arrest or of a search depends, in circumstances such as are presented here, essentially upon its reasonableness, the decision below, which brands as unreasonable action by police officers which appears thoroughly reasonable on its face, achieves a result which plainly demonstrates its own unsoundness.

We believe that, on the facts presented, the action of the police officer in taking respondent to the station house and searching him there may be justified, primarily, as a search of the person of the one arrested incident to a valid arrest. Alternatively, we believe that the police action may be upheld as incident to the search of a moving vehicle reasonably believed to be carrying contraband. We submit that, on either ground, the conduct of the officers concerned was reasonable under controlling decisions of this Court.

I

THE SEARCH OF RESPONDENT WAS JUSTIFIED AS INCIDENT TO A LAWFUL ARREST

Given a lawful arrest, it is undisputed that the body and clothing of the arrested person may be subjected to search; this has been many times held by this Court, nor has the principle been disputed in any of the recent cases dealing with the precise scope of the Fourth Amendment's interdiction of "unreasonable searches and seizures." *Weeks* v. *United States,* 232 U. S. 383, 392; *Carroll* v. *United States,* 267 U. S. 132, 158; *Agnello* v. *United States,* 269 U. S. 20, 30; *Harris* v. *United States,* No. 34, Oct. T. 1946, decided May 5, 1947, pp. 5–6 of slip opinion; see *People* v. *Chiagles,* 237 N. Y. 193 (*per* Cardozo, J.); compare Franfurter, J., dissenting in *Davis* v. *United States,* 328 U. S. 582, 609–610; Jackson, J., dissenting in *Harris* v. *United States, supra,* p. 2 of slip opinion; Murphy, J., dissenting in *Harris* v. *United States, supra,* p. 4 of slip opinion.

The inquiry here, therefore—and the only inquiry—is whether respondent was lawfully arrested. We agree with Judge Clark below that he was.

Starting from the proposition that, since a statute of the United States is the supreme law of the land (cf. *Testa* v. *Katt,* No. 431, Oct. T. 1946, decided March 10, 1947), a state officer may properly arrest for commission of a federal of-

fense (*Marsh* v. *United States*, 29 F. 2d 172 (C. C. A. 2); *United States* v. *One Packard Truck*, 55 F. 2d 882, 884 (C. C. A. 2); see *Gambino* v. *United States*, 275 U. S. 310, 314–316), we turn to the bases for asserting that Detective Gross had authority to arrest respondent.

By way of preliminary, it should be noted that, as all the judges below held, the agreement between Buttitta and Reed to transfer counterfeit ration coupons and bring about their possession by Reed was a conspiracy and thus a felony.[2] It is undisputed that Detective Gross, who arrested respondent, and O'Donnell, the O. P. A. investigator who accompanied him, had reasonable cause to believe that this felony had been committed. Moreover, the felony had in fact been committed.

[2] The agreement to effectuate the transfer of property which neither the transferor nor the transferee has the right to possess under any circumstances is manifestly different from an agreement to sell to another articles which may or may not be used illegally. Hence, neither the doctrine of *United States* v. *Falcone*, 311 U. S. 205, that one does not become a conspirator by making sales to a person who intends to use them illegally, nor even the caveat in *Direct Sales Co.* v. *United States*, 319 U. S. 703, 712, that a sale of "restricted goods" may not establish a conspiracy, are applicable here. The agreement to bring about the transfer of counterfeit ration coupons was an agreement to commit an offense against the United States and thus a conspiracy under Section 37 of the Criminal Code. It should be noted, moreover, that possession of the counterfeit coupons was itself a crime, capable of being committed by the transferee alone, and hence a conspiracy to bring about that result was a distinct offense punishable independently of the substantive crime. *United States* v. *Simonds*, 148 F. 2d 177, 178 (C. C. A. 2).

Furthermore, the transfer of the counterfeit coupons by Buttitta to Reed and their possession by Reed were themselves felonies under Section 28 of the Criminal Code (18 U. S. C. 72). *United States* v. *Serpico,* 148 F. 2d 95 (C. C. A. 2); *United States* v. *Raskin,* 52 F. Supp. 343 (E. D. N. Y.); *United States* v. *Mullin,* 51 F. Supp. 785 (E. D. Mo.). See also *Andrews* v. *United States,* 157 F. 2d 723 (C. C. A. 5), certiorari denied, February 17, 1947 (No. 881, Oct. T. 1946). These felonies, too, had actually been committed, and the arresting officers had reasonable cause to believe that they had been committed. Additionally, as Judge Clark points out, under the *Serpico* case the finding of the counterfeit coupons upon the respondent shows that he also was committing a felony (R. 45).

With the foregoing by way of background, we turn to an examination of the New York statute authorizing arrests by a peace officer without a warrant.

The second subdivision of Section 177 of the New York Code of Criminal Procedure authorizes such an arrest "When the person arrested has committed a felony, although not in his presence." This subdivision covers a case where the arrested person has in fact committed a felony although the arresting officer is unaware of the fact. See Waite, *Public Policy and the Arrest of Felons* (1933) 31 Mich. L. Rev. 749; Wilgus, *Arrest Without a Warrant* (1924) 22 Mich. L.

Rev. 673, 685. A similar provision is found in the statutes of numerous states and in the American Law Institute's model Code of Criminal Procedure.[3] A federal statute looks in the same direction.[4] The obvious justification for this statutory authorization is that, without it, a person actually guilty of the most heinous felony could not be lawfully arrested if he did not appear guilty.[5] The New York statute and others

[3] "*Section 21. Arrest by officer without warrant—when lawful.* A peace officer may, without a warrant, arrest a person:

* * * * * *

"(b) When the person to be arrested has committed a felony, although not in the presence of the officer.

* * * * * *

The commentary to the model code, at pp. 234–235, lists (as of 1930–31) the statutes of seventeen states which embody this provision in substance.

[4] See the proviso to 18 U. S. C. 53a, declaring an unlawful search by any federal law enforcement officer to be a misdemeanor: "*Provided*, That nothing herein contained shall apply to any officer, agent, or employee of the United States serving a warrant of arrest, or arresting or attempting to arrest any person committing or attempting to commit an offense in the presence of such officer, agent, or employee, or who has committed, or who is suspected on reasonable grounds of having committed, a felony."

The statute authorizing members of the Federal Bureau of Investigation to make arrests does not go this far. 5 U. S. C. 300a.

[5] As one commentator put it, "The rule is that an officer may lawfully arrest even an *innocent* person when he believes and has reasonable ground to believe that person guilty of a felony. But, for some inenubilous reason, it is not the law that he may lawfully arrest a *guilty* person whom he

like it is designed to introduce more rationality into the law, particularly in the recurring instance of arrests for unlawfully carrying concealed weapons. See Waite, *Public Policy and the Arrest of Felons* (1933) 31 Mich. L. Rev. 749, *passim;* cf. *Holley* v. *Mix,* 3 Wend. (N. Y.) 350, 353. Under that statute, respondent's arrest was plainly legal.

But the officer's act can also be justified under the third subdivision of Section 177, "When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it." This states the familiar principle repeatedly laid down in the federal cases, and which would have been applied in the absence of statute. A police officer "may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony" (*Carroll* v. *United States,* 267 U. S. 132, 156), i. e., he may arrest on reasonable cause to believe that a felony has been committed, and that the person arrested has committed it. If a felony has in fact been committed, either an officer or a private person may arrest anyone reasonably believed to have committed the felony. *United States* v. *Lindenfeld,* 142 F. 2d 829, 831 (C. C. A. 2), certiorari denied, 323 U. S. 761; *Brady* v. *United States,* 300 Fed. 540, 543 (C. C. A. 6), certiorari

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suspects of felony but whom, the court opines, he had not reasonable ground to suspect." Waite, *Some Inadequacies in the Law of Arrest* (1931) 29 Mich. L. Rev. 448, 453. See also Comment (1932) 30 Mich. L. Rev. 1288.

denied, 266 U. S. 620; see Wilgus, *Arrest Without a Warrant* (1924) 22 Mich. L. Rev. 673, 685–701.

Here, therefore, Detective Gross had the right to arrest respondent if he had probable cause to believe that respondent was a party to the conspiracy between Buttitta and Reed, or that he had aided and abetted the commission of the substantive crime of possessing or transferring the counterfeit ration coupons.

The controversy in the court below turned on the existence of probable cause to entertain such belief on the basis of the circumstances proved. Here again, the general legal principles are not in dispute. The accepted definitions of probable cause are those adopted with approval from state cases by this Court in *Stacey* v. *Emery*, 97 U. S. 642, 645:

> * * * A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offence with which he is charged.
>
> * * * Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty. * * *

Or, as this Court, again quoting a state case, said in *Carroll* v. *United States*, 267 U. S. 132, 161, "The substance of all the definitions is a reasonable ground for belief in guilt."

This Court itself has emphasized that actual guilt need not be established to show probable cause; that it is sufficient if the officer acts as a reasonably prudent man.

> To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. (*Husty* v. *United States*, 282 U. S. 694, 700–701.)
>
> In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. (*Dumbra* v. *United States*, 268 U. S. 435, 441.)

The test of the validity of an arrest in other words is reasonable deduction, not proof beyond a reasonable doubt.

The fundamental error in the majority opinion below is that it tests the validity of the arrest, not by standards of reasonable deduction, but by standards of substantive guilt. The gist of the ruling of the majority below is that probable cause for respondent's arrest was not established because mere knowledge or acquiescence in a conspiracy is not sufficient to establish a person's guilt as a co-conspirator. Unquestionably, such is the rule when a jury is called upon to judge the sufficiency of all the evidence adduced at a trial for conspiracy. But, even at a trial, proof of association with known conspirators, proof of knowledge of the conspiracy, and proof of presence at the time of the commission of an overt act are

relevant facts to be considered in determining whether a particular individual has participated in the conspiracy. *United States* v. *Valenti*, 134 F. 2d 362, 363 (C. C. A. 2), certiorari denied, 319 U. S. 761; *Banning* v. *United States*, 130 F. 2d 330, 337 (C. C. A. 6), certiorari denied, 317 U. S. 695; *United States* v. *Hannon*, 105 F. 2d 390, 392 (C. C. A. 3), certiorari denied, 308 U. S. 594; *Minner* v. *United States*, 57 F. 2d 506, 510 (C. C. A. 10); *Kanner* v. *United States*, 34 F. 2d 863, 866–867 (C. C. A. 7). And proof of association may sometimes be so strong as to constitute proof of the offense. See *United States* v. *Valenti*, *supra*; *Beard* v. *United States*, 82 F. 2d 837, 844 (App. D. C.), certiorari denied, 298 U. S. 655. *A fortiori*, the concurrence of all these factors at a particular time and place is a circumstance from which a reasonable law enforcement officer could reasonably conclude that a third person, deliberately brought along by the conspirators to the place where a crime has just been enacted, is implicated in the conspiracy and the crime. As Judge Clark very properly pointed out below (R. 44–45), "Police officers cannot be held unreasonable in declining to view as a mere bystander one who accompanies a criminal to a crime rendezvous."

From early times, association with a person known to have recently committed a crime has been considered probable cause justifying arrest. Thus, in *Sir Anthony Ashley's Case*, 12 Coke 90

(1612), one of the first cases to formulate the rule governing the right of private persons to make an arrest, it was said (p. 92):

> And in this case it was resolved, that if felony be done, and one hath suspicion upon probable matter that another is guilty of it, because that he had part of the goods robbed, and is indigent, or if the party be indicted, or if murder be committed, and one is seen near the place, or coming with a sword or other weapon embrued with blood, *or that he was in company of felons,* or hath carried the goods stolen to obscure places, or such like things, these are good causes of suspicion; and by reason of this he may arrest the party so suspected, to the end that he may subject him to justice. [Italics added].

Hale in his *Pleas of the Crown,* written in the second half of the Seventeenth Century, in discussing the right of private persons to make an arrest mentions, among other grounds justifying arrest, the fact that the person arrested is "party with him that committed the robbery" (vol. 2, p. *81). In the following century, Hawkins (2 *Pleas of the Crown,* c. 12, § 11) lists as good probable cause for arrest "the being in company with one known to be an offender, at the time of the offence."

Until the decision below, it had been assumed as a matter of course, in more modern cases, that when several persons are found together at the

place where a crime has just been committed, all persons so found are subject to arrest. Certainly no one would suppose that a person brought along by a bank robber at the time of the robbery was there merely to enjoy the spectacle. Men found near a still in ordinary working clothes are regularly arrested on the assumption that they have some connection with the operation of the still, although conceivably their presence might be otherwise explained. It has been held that men apparently at ease in an establishment where bets were known to have been taken were not only justifiably arrested, but justly convicted of conspiracy to operate the establishment. *Beard* v. *United States*, 82 F. 2d 837, 844 (App. D. C.), certiorari denied, 298 U. S. 655. In liquor and narcotics cases, it frequently happens that officers receive information merely that a certain automobile will be carrying contraband at a particular time. When the car is stopped and found to be carrying liquor or narcotics, all persons in the car are regularly arrested. The validity of such arrests has been assumed without question in reported decisions. *Kaiser* v. *United States*, 60 F. 2d 410 (C. C. A. 8), certiorari denied, 287 U. S. 654; *Hawthorne* v. *United States*, 37 F. 2d 316 (C. C. A. 4); *United States* v. *Wiggins*, 22 F. 2d 1001 (D. Minn.); *In re Woodward*, 1 F. 2d 672 (W. D. N. Y.); *United States* v. *Stafford*, 296 Fed. 702 (E. D. Ky.); and see *State* v. *Hatfield*, 112 W. Va. 424 (1932), where four men were arrested when

one threw out a pistol. Yet, under the decision below, since mere presence in a car at the time of the commission of a crime is not a sufficient circumstance from which to infer participation in the crime, officers who stop a car carrying contraband would be justified in arresting only the driver of the car. Such a ruling could, we submit, lead to absurd results. It would invite the leader of a criminal venture to endeavor to avoid arrest by the simple expedient of always having an employee drive his car or effect the actual transfer of the contraband. And if it be said that the rule below is limited to situations where particular individuals have been previously identified, and does not apply to situations where no participants have been specified, the results would still be absurd, for such a holding would enable accomplices to throw suspicion on a minor employee and make arrest of the major offender more difficult.

The majority of the court below neglected to take into consideration one simple fact of human conduct implicitly recognized for at least three centuries, i. e., that criminals are not prone to arrange to have disinterested third parties present to witness their crimes. Common experience shows this to be true. It cannot be overemphasized in this case that respondent is not a person who could have been present at the time of the commission of the crime without a prior design on the part of the known conspirators to

bring him there, and that he was brought by them to the very place arranged for the commission of a previously conceived crime. Police officers, faced with the necessity of taking immediate action to deal with a recently committed crime, are entitled, we submit, to make their decisions on the basis of normal human conduct, and are not required to conjure up unlikely possibilities which might, in a rare case, account for the fact that an innocent person has been brought by criminals to the scene of the crime. Their decision to treat the third person as one implicated in the crime is particularly justified where, as here, that third person makes no protestation of innocence and attempts no explanation for his presence until some time after he has been arrested. As this Court said in *Bilokumsky* v. *Tod*, 263 U. S. 149, 153:

> Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character.

Arrest, after all, is not conviction. More latitude in the drawing of inferences from circumstances must be accorded to an officer making an arrest than would be allowed a jury in determining guilt. It is a reasonable inference that one brought by criminals to the place previously arranged for the commission of a preconceived crime is implicated in the crime. Considering all the circumstances, therefore, we submit that the police officer had probable cause for the arrest

of respondent and for the search of his person as incident thereto.

II

ALTERNATIVELY, THE SEARCH OF RESPONDENT WAS JUSTIFIED AS INCIDENT TO THE SEARCH OF A MOVING VEHICLE REASONABLY BELIEVED TO BE CARRYING CONTRABAND

In any event, and without regard to the validity of his arrest, the search of respondent's person may be upheld, in the circumstances, as incident to the search of a moving vehicle reasonably believed to be carrying contraband. The undisputed facts in this case establish that the police officer, Detective Gross, and the O. P. A. investigator, O'Donnell, who accompanied him, had reason to believe that the automobile in which respondent was riding shortly before he was taken to the police station was being used to transport counterfeit ration coupons. Whatever may be the status of genuine ration coupons intended for sale contrary to law, there can be no question that counterfeit coupons are contraband in the narrow sense of that term; they are articles in the same category as narcotics, weapons, counterfeiting apparatus, etc. Hence, under the decisions of this Court, the officer had authority to stop and search the automobile. *Carroll* v. *United States,* 267 U. S. 132; *Husty* v. *United States,* 282 U. S. 694. See also *Leong Chong Wing* v. *United States,* 95 F. 2d 903 (C. C. A. 9), which involved a factual situation very similar to that presented here in

that a car was stopped and searched on probable cause to believe that it was being used as a meeting place for the sale of opium.

The validity of such a search is not dependent on the principles governing the right to arrest the occupants without a warrant. As this Court said in *Carroll* v. *United States,* 267 U. S. at 158–159:

> The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law.

In the *Carroll* case, there was no right to arrest, since the offense was only a misdemeanor. And the right to search was based on the practical circumstance that a moving vehicle could not be effectively apprehended for purposes of search if such search were required to be preceded by issuance of a warrant. That right, to search a vehicle without a warrant, persists even though the vehicle may have come to a stop a short time before the officers approach it. See *Scher* v. *United States,* 305 U. S. 251, 255, where an automobile was searched after it had entered a garage. See also *Stobble* v. *United States,* 91 F. 2d 69 (C. C. A. 7); *Earl* v. *United States,* 4 F. 2d 532 (C. C. A. 9).

Since, therefore, a search of the car would clearly have been proper, a search of the occupants of the car was, we submit, also proper under

the circumstances of this case. We have found no authority dealing specifically with the question of the right to search the occupants of a car thought to be carrrying contraband, but common sense demands that such right exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person. Cf. *Harris* v. *United States, supra,* p. 7 of slip opinion. We do not suggest that where officers have information that a vehicle is being used to carry gallon jugs, they may justify a search of an individual's pockets on such ground without a valid arrest of the person. But where, as here, the contraband sought is of such a nature that it could easily be concealed on the person, could even be slipped into the pockets of a passenger in the car without his knowledge, then a right to search the automobile without a right to search the occupants of the automobile would very frequently be meaningless. Reported decisions have assumed, without discussion, that the right to stop and search an automobile includes the right to take contraband from a person in the car. See *Stobble* v. *United States,* 91 F. 2d 69, 70 (C. C. A. 7), where an envelope believed to contain heroin was taken from the defendant while she was sitting in a parked car; *Cassidy* v. *United States,* 49 F. 2d 504, 505 (App. D. C.), where a pint bottle of liquor was taken from the defendant's hip pocket at the time his car was

searched. While, in both these cases, the persons from whom the contraband was taken were subject to arrest, the taking of the articles was treated in the decisions as part of the search of the vehicle.

Considering the nature of the offending instruments sought in the instant case, we submit that the officer had the right to search the occupants of the automobile as well as the automobile itself. At the very least, we submit, the right to search the vehicle for the type of contraband here involved carried with it the right to search respondent to the extent that he was first searched at the police station when he was asked to lay his possessions on the table. It is unnecessary for the purposes of this stage of the argument to go further. Once past the present point, of course, considering the circumstances under which respondent was originally found, his production of several loose gasoline coupons with the unlikely explanation that he had found them on the street was unquestionably ample justification for his arrest and for the subsequent more thorough search of his person as incident thereto.

The fact that this search of respondent's pockets was conducted at the station house, rather than at the place where the car was parked, does not, we think, affect its validity under the foregoing principles. If there was a right to search at all, there was a right to conduct that search

in a suitable place. Thus, for example, if a motor vehicle inspector has a right to test the weight of a loaded truck, he would undoubtedly have the right to require the truck to be driven to the place where the scales are kept. See Perkins, *Law of Arrest* (1940) 25 Iowa L. Rev. 201, 207. In *Coupe* v. *United States*, 113 F. 2d 145 (App. D. C.), certiorari denied, 310 U. S. 651, officers who had reason to believe that an automobile was being used to carry policy slips took the car to police headquarters before searching it. See 113 F. 2d at page 146. Their right to do so was assumed in an opinion by Mr. Justice Rutledge.

Here, the officers had reason to suspect that the automobile was being used to carry the kind of contraband that could easily be concealed on the person of the occupants of the automobile. The automobile was, however, parked on a public street, manifestly not a place in which a search of a person's clothing can reasonably be conducted. It was, therefore, reasonable and, by the same token, proper, to take the occupants of the automobile to a place where a search of their persons could be conducted effectively.

If there was a right to search, the taking of the occupants of the car to the station house for the purpose of search did not amount to an arrest, and the validity of such action need not be judged by the rules governing the right of arrest. In this view, the search of respondent's

person at the station house was merely incident to the well recognized right to search a moving vehicle believed to be carrying contraband. And, under the principles enunciated by this Court in the *Carroll* case, the search was a reasonable one.

CONCLUSION

The action of the police officer in taking respondent to the station house and searching him after he had been found in an automobile at a place known to be the rendezvous for the transfer of contraband was reasonable under established principles governing the search of moving vehicles and the arrest of persons who have committed or who are believed to have committed a crime. The judgment of the circuit court of appeals should therefore be reversed and the judgment of the district court reinstated.

Respectfully submitted.

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